

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN)**

CASE NO. JR2729/10

In the matter between:

FIRM O'SEAL CC

Applicant

And

**THE METAL & ENGINEERING
INDUSTRIES BARGAINING COUNCIL**

First Respondent

JOSEPH MPHAPHULI N.O.

Second Respondent

ELPHAS SITHOLE

Third Respondent

Date of Hearing: 20 July 2011

Date of Judgment:

JUDGMENT

Masher AJ

1. INTRODUCTION

1.1 This is an application to review and set aside the arbitration award issued by the second respondent under Case No. MEGA28975 dated 18 July 2010.

1.2 The application was delivered outside the six week period required in terms of section 145 of the Labour Relations Act. The applicant applied for condonation. I have considered the application for condonation and condone the late delivery of the review application.

- 1.3 In the arbitration award, the second respondent found that the third respondent had been dismissed and that his dismissal was unfair. The second respondent ordered that the applicant pay compensation of R22 924,52 to the third respondent.

2. **BACKGROUND**

- 2.1 The applicant conducts a general engineering business. The third respondent was employed by the applicant as a general worker. It was common cause at the arbitration that on 2 December 2009, the applicant's foreman instructed the third respondent to wash an office worker's car, which the third respondent refused to do. It was further common cause that on 3 December 2009, the third respondent was called to the office of the managing member of the applicant for a meeting with the managing member and the foreman.
- 2.2 The applicant's case in short at the arbitration was that during this meeting, the managing member informed the third respondent that his behaviour on 2 December 2010 was unacceptable and that in response to this, the third respondent informed the managing member that he was not prepared to discuss the matter any further and left the premises despite requests for him to return. The applicant's case further was that the foreman made numerous telephone calls to the third respondent in an attempt to call the third respondent back to work but that these calls were unsuccessful. The applicant accordingly submitted that the third respondent was not dismissed, but that he had left the workplace and only returned later to collect his accumulated leave pay.
- 2.3 The third respondent's case during arbitration in short was that he was under strict instructions from the managing member not to wash any

employee's car and that because of this, he resisted an instruction from the foreman on 2 December 2009 to wash an office worker's car. The third respondent testified that the foreman vowed that he would see to it that the third respondent gets fired failing which the foreman would resign. The third respondent confirmed that he was called to a meeting on 3 December 2009 where the managing member and the foreman were present. The third respondent's version of events at the meeting was that the managing member instructed him to leave the premises immediately and never return. The third respondent accordingly submitted during the arbitration that he had been dismissed and that his dismissal was both procedurally and substantively unfair.

3. GROUNDS FOR REVIEW

- 3.1 The applicant contends that the finding of the second respondent that -

"I find it likely that the foreman had related to the principal member the events of the previous day and carried the dismissal threat through the principal member.

There was no motivation for the applicant to voluntarily abandon his position. The applicant was most unsophisticated, had no skills of note, was of an advanced age and could not hope to find another job.

It is these considerations that make it very unlikely that the applicant would have freely vacated his position."

is based on evidence that was not put before the second respondent at the arbitration. The applicant argued that the second respondent was only entitled to consider evidence placed before him at the arbitration. Evidence of the factors the second respondent considered in coming to this conclusion were not placed before the second

respondent and he could therefore not consider those factors. In addition, the applicant argued that the second respondent made no finding as to the credibility of either of the two single witnesses who testified for the applicant at the arbitration.

- 3.2 The applicant also contends that the conclusion drawn by the second respondent is not one which is rationally justifiable based on the evidence, neither is it one which a reasonable commissioner could have come to bearing in mind the onus of proof, namely that the third respondent in this matter had to prove the existence of a dismissal.

4. EVALUATION

- 4.1 The test to apply in considering whether or not the decision of the second respondent should be interfered with on review is that of a reasonable decision-maker. This test was set out in Sidumo and Another v Rustenburg Platinum Mines Ltd & Others 2007 28 ILJ 2405 (CC), as being “whether the decision reached by the Commissioner is one which a reasonable decision-maker could not reach”.
- 4.2 In the present matter, it is common cause that the only question before the second respondent was whether the third respondent had been dismissed or not. In determining this question, evidence regarding what occurred at the meeting of 3 December 2009 was placed before the second respondent.
- 4.3 The applicant’s evidence was that during the meeting on 3 December 2009 after being informed by the managing member that his conduct on 2 December 2009 was unacceptable, the third respondent said that he was not prepared to discuss the matter any further and left. The applicant’s foreman further testified that he made telephone calls to

the third respondent to call him back but that these calls were unsuccessful.

4.4 The third respondent's evidence was that during the meeting, the managing member instructed him to vacate the premises immediately and never to return.

4.5 It is trite that where a dispute exists about the existence of a dismissal, the employee claiming dismissal has the onus of proving the dismissal on a balance of probabilities. In the present matter, the third respondent's evidence at the arbitration was clear. I am satisfied that the evidence of the third respondent that he had been instructed to vacate the premises immediately and never to return, is sufficient to establish a dismissal on a balance of probabilities. Once this had been established, the second respondent was required to assess the applicant's evidence about what had occurred at the meeting on 3 December 2009. It is clear from the arbitration award that the second respondent considered all the evidence placed before him by the applicant and the third respondent regarding what had occurred on 2 and 3 December 2009. In assessing this evidence, the second respondent finds that –

"I find it likely that the foreman had related to the principal member the events of the previous day and carried the dismissal threat through the principal member.

There was no motivation for the applicant to voluntarily abandon his position. The applicant was most unsophisticated and had no skills of note and was in an advanced age and could not hope to find another job. Employment was the applicant's only source of income.

There was more benefit from staying in the job than to walk out of the job. It is these considerations that make it very unlikely that the applicant would have freely vacated his position."

- 4.6 Counsel for the applicant in support of his submissions referred me to the decision of the Metal and Engineering Industries Bargaining Council in National Union of Metalworkers of SA obo Dolley & others and Formex Engineering (2005) 26 ILJ 1557 (BCA) in which reference is made to a string of decisions, including the decision of the Eastern Cape Division in National Employer's General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) confirming the principle that a trial court is required to consider the credibility of witnesses in conjunction with the probabilities and it is only where the probabilities fail to indicate where the truth probably lies, that the court should have recourse to an evaluation of the credibility of the witnesses.
- 4.7 This an accurate statement of our law as more recently confirmed by the Appellate Division in Baring Eiendomme Bpk v Roux [2001] 1 All SA 399 (A). However, when assessing the credibility of a witness the court must take into account a wide variety of factors. Included in the factors which a court would look at in examining the credibility of any witness, are matters such as the witness's age where this is relevant, his intellect and his ability to effectively communicate what he intends to say, and the weight to be attached and the relevance of his version against the backdrop of the pleadings (See Hees v Nel 1994 1 PH F11 (T) 32 and PJ Schwikkard and SE van der Merwe (2002), *Principles of Evidence*, (2nd Edition), Cape Town: Juta, at page 501).
- 4.8 In my view the second respondent clearly considered the mutually destructive evidence of both parties and was unable to make a finding as to where the truth lay based on this evidence. This is evident from the second respondent's analysis of the evidence where, after hearing all the evidence, he finds that –

“In dispute was whether the Respondent terminated the Applicant’s services on the morning of 03 December 2009, or not. The Applicant argued in favour of a dismissal. The Respondent expressed the opposite.”

4.9 This finding indicates in my view that the second respondent was unable to come to a decision based on the evidence alone and therefore had regard to factors such as the third respondent’s age and lack of skills and sophistication in determining that it was very unlikely that the Applicant would have freely leave his employment. In doing so the first respondent applied the principles of evidence referred to above. The second respondent was entitled to consider these factors without the third respondent having testified about them. The third respondent was a witness before the second respondent at the arbitration and he was entitled to draw reasonable conclusions from what he saw and heard when the third respondent testified. In my view the second respondent’s decision is not one that a reasonable commissioner could not reach.

4.10 In all the circumstances I find no reason to interfere with the second respondent’s award. Accordingly the applicant’s application is dismissed with no order for costs.

MASHER, D H
Acting Judge of the Labour Court
of South Africa

Representation:

For the Applicant:	Mr A Brandmuller of Brandmuller Attorneys
For the Third Respondent:	No Appearance